IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SHEARWOOD FLEMING,

Petitioner,

v

ANTHONY KANE,

Respondent.

_____

BOARD OF PAROLE HEARINGS,

Real party in interest.

_____/

No C 05-3564 VRW

ORDER

Petitioner Shearwood Fleming, a prisoner at the Correctional Training Facility in Soledad, California, has filed a petition for a writ of habeas corpus under 28 USC § 2254. Petitioner challenges a September 18, 2002 decision by the Board of Prison Terms (merged into the Board of Parole Hearings after the petition was filed) ("Board") denying him parole. Doc #1. Respondent Anthony Kane filed an answer on March 19, 2007 opposing the issuance of a writ (Doc #21) and petitioner filed a traverse on May 25, 2007 (Doc #28).

For the reasons stated herein, the petition for a writ of habeas corpus is hereby DENIED.

I

A

On March 3, 1981, petitioner pled guilty to second degree murder in superior court in Los Angeles. He was sentenced to fifteen years to life imprisonment with a two-year enhancement for the use of a firearm during the commission of the crime. Appx A-I, Ex A at 110; Doc #21, Ex 1. Petitioner disputes the extent of his responsibility for the homicide underlying his conviction, but he acknowledges the "appropriateness of his conviction" for second degree murder. See Doc #17 at 2; Doc #16 at 14, fn 11. Because petitioner was sentenced pursuant to a plea agreement, the underlying facts of the crime were never adjudicated. These facts play an important role in petitioner's habeas corpus proceedings, however, as the commitment offense played a large role in the Board's decision to deny petitioner parole.

Petitioner's version of the facts is as follows: On August 10, 1980 at approximately 11 pm, petitioner, then twenty years old, met sixteen-year-old Joey Sherrod at a beach in Santa Monica. Appx A-I, Ex A at 175. During this encounter, petitioner and Sherrod had a discussion about "how the Mexicans were killing a lot of blacks; about how they shot 'Boo' and 'AJ', and [] about the close encounter [petitioner] had with some Mexicans 4 weeks ago." Id. According to petitioner, Sherrod mentioned that he wanted to rob "some Mexicans, * * * the same ones that shot Boo and AJ,

\\

because if they don't give up any money then I blow their heads off." Id.

The duo, in possession of a gun, left the beach and passed through a vacant lot on Santa Monica Avenue, where they saw the two victims, Nazario Garcia and Samuel Trujillo, walking home. Doc #16 at 13. Petitioner and Sherrod stepped out of the bushes and asked the victims for money. Appx A-I, Ex A at 175. The victims "started laughing, and [petitioner] couldn't comprehend what they were saying because they were speaking spanish." Id.

At his initial interview by police on August 13, 1980, petitioner stated that once the victims left, Sherrod discharged the gun at them. Id. The gun "suddenly clicked," misfiring, and petitioner started "running for it." Id. At this point, petitioner stated that he heard the gun fire, and he "started running back to see what happened." Id. He saw one victim, later identified to be Garcia, lying on the ground. Petitioner stood over Garcia, "feeling sorry," and then heard another "set of shots." Id. He saw the second victim, Trujillo, "running for his life." Appx A-I, Ex A at 176.

In his subsequent testimonies before the parole board, however, petitioner changed his story and stated that he was the one who initially held and fired the weapon. See, e g, Appx A-II at 406 ("when they started laughing, he asked me to shoot and so I pointed the gun up in the air and I didn't know it had a safety mechanism * * * a safety catch on it"); see also id at 644. After the gun failed to discharge, petitioner testified that: "Joey then snatched the gun from me * * * and shot Mr Garcia in the side as he was running" (Appx A-I, Ex E at 376); Garcia was shot twice in the

stomach as he was running (Appx A-II at 408-09); Garcia then fell to the ground, and petitioner approached him and stood over him to see if he had been shot while Sherrod continued shooting at Trujillo. Petitioner "has always consistently maintained" that it was Sherrod, not he, who shot and killed Garcia. Doc #17 at 2.

Respondent presents a different version of the crime in which the petitioner, not Sherrod, shot at the victims as they ran away. Doc #21 at 2. Quoting the probation officer's report, respondent asserts that, according to Trujillo, after shooting and injuring Garcia, petitioner walked up to him together with Sherrod, shot him in the stomach while standing over him and then ran away through the vacant lot. Id; Appx A-I, Ex A at 68. Police and rescue personnel pronounced Garcia dead at the scene of the crime. Appx A-I, Ex A at 68. The following day, Trujillo identified petitioner as the shooter and four other witnesses interviewed at the crime scene saw petitioner and Sherrod at the location and overheard them "state they had just shot and killed the Mexican." Appx A-I, Ex A at 149. Petitioner and Sherrod were arrested separately on August 13, 1980, and each accused the other of being the shooter who killed Garcia. Id.

After pleading guilty and receiving his sentence, petitioner began serving fifteen years to life on April 7, 1981. Appx A-I, Ex C at 300. He received his initial parole consideration hearing on August 14, 1990, approximately nine years into his sentence, and was denied parole. Doc #17 at 4. Petitioner then sought and was denied parole in 1992, 1994, 1997, 1999 and 2002. Doc #17 at 5-9.

\\

B

On September 18, 2002, the Board found petitioner unsuitable for parole for a sixth time and deferred reconsideration for four years. Appx A-I, Ex C at 320-26. The Board's decision, which fills six pages of transcript, found that petitioner was "not suitable for parole and would pose an unreasonable risk of danger to society or a threat to public safety if released from prison," citing: petitioner's commitment offense, petitioner's previous record, his institutional behavior, his inconclusive psychological report, his lack of realistic plans if paroled and letters and other evidence submitted in opposition to parole. Id.

Presiding commissioner Jones Moore stated that petitioner's commitment offense was carried out in an especially cruel and callous manner because "[t]here were multiple victims attacked, injured and killed in the same incident" and the offense was "carried out in a dispassionate and calculated manner. And the offense was carried out in a manner which demonstrates an exceptionally callous disregard for human sufferings." Appx A-I, Ex C at 324. In support of this finding, Moore stated that after Garcia had fallen to the ground, petitioner "stood up over the top of the victim and shot and killed him." Id.

Moore also noted petitioner's "extensive history of criminality and misconduct," which include arrests for possession of a revolver, attempted robbery, possession of alcohol as a minor and battery, a "history of unstable and tumultuous relationships with others" and the fact that he had dropped out of high school and developed drug and alcohol problems. Id at 324-25.

\\

Moore found that while incarcerated, petitioner "has not completed necessary programming which is essential to his adjustment" and "has not developed a marketable skill or a vocation at this time." Id at 321. At the hearing, Deputy Commissioner Dennis Smith questioned petitioner about his decision to discontinue Narcotics Anonymous and Alcoholics Anonymous in 1999. Id at 301.

Moore further noted that petitioner had received two write-ups for misconduct since his previous parole hearing, thus failing to demonstrate "evidence of positive change," id at 321-22, and had a total of thirteen CDC 115s (which are given to inmates for misconduct) and twelve CDC 128s (cautionary write-ups) over the course of his term of incarceration. Appx A-I, Ex C at 323. According to CDC documents in the record, petitioner's CDC 115s include a stabbing assault on another inmate, conspiracy to assault prison staff and disobeying direct orders. Appx A-I, Ex A at 22.

Moore expressed skepticism about a somewhat optimistic 1999 psychological report prepared by CDC staff psychologist Dr Steven Terrini because it "misstates or misquotes the facts" regarding petitioner's disciplinary record by incorrectly stating that petitioner had no CDC 115s. Appx A-I, Ex C at 322. Because of this error, the commissioners did not give much weight to Dr Terrini's conclusion that "[i]f released to the community [petitioner's] violence potential at this time is estimated to be no more than the average citizen in the community" and that petitioner "is competent and responsible for his behavior." Appx A-I, Ex B at 220-23.

\\

The commissioners also found that petitioner "lacks realistic parole plans" because he "does not have a viable residential plan * * * nor does he have acceptable employment plans." Appx A-I, Ex C at 322. Petitioner had testified that his plans for parole included "work with kids and do upholstery work, and just the writing" —— two plays by petitioner are included in the record (Appx A-I, Ex B at 250-86) —— and possible participation in his friend's film-making company. Id at 311.

Moore also noted that the Los Angeles County District Attorney's office and the Los Angeles Police Department had submitted written opposition to a finding of parole suitability, id at 322, and that a August 2002 report by "the prisoner's counselor wrote on his August 2002 Board report that CCI M Morton said that the prisoner poses a moderate degree of threat if released to the public at this time." Id at 323.

Petitioner properly exhausted his administrative remedies and his habeas petitions through the state system. See order dated February 16, 2007 (Doc # 20) at 6.

On February 2, 2005, the superior court in Los Angeles denied petitioner's habeas petition, finding that there was "some evidence" that: the crime involved multiple victims and was carried out in a dispassionate and calculated manner; petitioner lacked realistic parole plans and failed to participate sufficiently in self-help programming; petitioner had a number of disciplinary write-ups while incarcerated and the psychological evaluation was inconclusive because it was based on the erroneous belief that petitioner had a minimal disciplinary history. Appx A-I, Ex J at 701-03. The superior court rejected several of the

Board's findings as lacking evidentiary support in the record, specifically that: the crime was performed with an "exceptionally callous disregard for human suffering" within the meaning of California Code of Regulations title 15 § 2402(c)(1)(D); petitioner had a history of "unstable or tumultuous relationships"; and petitioner had a prior record of violence. Id at 702.

The superior court rejected petitioner's arguments based on his plea agreement, reasoning that (1) petitioner signed a plea agreement that provided for an indeterminate sentence with a maximum possible term of life in prison; (2) the Board was not a party to the plea agreement; and (3) the Board's mandate is to exercise the power to grant or deny parole with the safety of the community as its foremost consideration. Id at 704. The superior court also rejected without discussion petitioner's arguments based on Penal Code § 3041, proportionality and the Board's "failure to comply with the mandate that parole shall normally be given," citing In re Dannenberg, 34 Cal 4th 1061, 1095 (2005) Id.

Both the California Court of Appeal, id, Ex 5, and the California Supreme Court, id, Ex 6, summarily denied habeas relief. On September 2, 2005, petitioner timely filed his petition in federal court.

II

The court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 USC § 2254(a); Rose v Hodges, 423 US 19, 21 (1975).

A state court's determination is reviewed for unreasonableness, not error. Williams v Taylor, 529 US 362 (2000); Anderson v Alameida, 397 F3d 1175, 1179 (9th Cir 2005). A federal court may grant habeas relief if the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the [United States] Supreme Court" or "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 USC 2254(d).

To determine whether a state court's decision is contrary to, or an unreasonable application of, clearly established federal law, this court must look to the highest state court to address the merits of petitioner's claim in a reasoned decision. LaJoie v Thompson, 217 F3d 663, 669 n7 (9th Cir 2000). If state appellate courts summarily deny a petitioner's claim, a federal court must "look through" the summary disposition to the last reasoned opinion. Shackleford v Hubbard, 234 F3d 1072, 1079 n2 (9th Cir 2000) (citing Ylst v Nunnemaker, 501 US 797, 803-4 (1991)). Here, the opinion the court must examine through AEDPA's lens is that of the superior court.

California prisoners have a cognizable liberty interest in being granted parole, as noted in the court's order to show cause dated July 5, 2006. Doc #11. A habeas petition from a state prisoner challenging the denial of parole is cognizable under § 2254(d). Sass v California Board of Prison Terms, 461 F3d 1123, 1126-28 (9th Cir 2006). The Ninth Circuit recently discussed prisoners' liberty interest in parole in Irons v Carey, 2007 WL 2027359, *3 (July 13, 2007, ptn for reh'g denied November 6, 2007):

"California Penal Code section 3041 vests Irons and all other California prisoners whose sentence provides for a possibility of parole with a constitutionally protected liberty interest in the receipt of a parole release date, a liberty interest that is protected by the procedural safeguards of the Due Process Clause." See also Board of Pardons v Allen, 482 US 369, 381 (1987)(Montana's parole statute confers on state prisoners a liberty interest in parole release that is protected under Due Process Clause of Fourteenth Amendment); accord, Greenholtz v Inmates of Nebraska Penal and Correctional Complex, 442 US 1, 7 (1979); Sass, 461 F3d at 1128; McQuillion v Duncan, 306 F3d 895, 900 (9th Cir 2002).

A parole board, in order to satisfy due process, must rely on "some evidence in the record" when denying a prisoner parole. See Irons, 2007 WL 2027359 at *3. "To determine whether the some evidence standard is met 'does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board.'" Sass, 461 F3d at 1128 (quoting Superintendent, Massachusetts Correctional Institution at Walpole v Hill, 472 US 445, 454 (1984)). The "some evidence standard is minimal" and its purpose is to ensure that "the record is not so devoid of evidence that the findings of the [parole board] were without support or arbitrary." Id at 1129. The evidence relied upon by the board must have "some indicia of reliability." McQuillion, 306 F3d at 904; Jancsek v Oregon Board of Parole, 833 F2d 1389, 1390 (9th Cir 1987).

\\

Respondent urges the court not to apply the "some evidence" standard, arguing that while the Ninth Circuit in Sass extended the Supreme Court's "some evidence" test to the parole context, the Supreme Court has never actually held that a state parole hearing must be supported by some evidence, so this standard cannot form the basis for federal habeas review under AEDPA. Doc # 21 at 9-10. While respondent's argument possesses a certain abstract logic, this district court has no practical alternative but to apply Ninth Circuit rules in habeas cases unless and until the Supreme Court establishes new and different ones. Irons, meanwhile, is unequivocal in articulating the applicable Supreme Court rule in such cases: "[a]t the time that Irons's state habeas petition was before the state courts, the Supreme Court had clearly established that a parole board's decision deprives a prisoner of due process with respect to this interest if the board's decision is not supported by 'some evidence in the record.'" 2007 WL 2027359, *3.

When applying the some evidence standard, the court must look to the California statute codifying the factors for parole boards to use when granting or denying parole. Id. California Penal Code § 3041(b) (West 2005) provides that the parole panel or board:

> shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting.

The implementing regulations for section 3041(b) provide the Board

with the factors to consider in determining whether an inmate convicted of murder is suitable for parole. See 15 Cal Code Regs §§ 2400-11. Section 2402(a), which sets forth the criteria for determining suitability for parole, unequivocally states that "[r]egardless of the length of time served, a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison."

Factors tending to show "unsuitability" for parole are as follows:

> (1) Commitment Offense. The prisoner committed the offense in an especially heinous, atrocious or cruel manner. The factors to be considered include:
>
> > (A) Multiple victims were attacked, injured or killed in the same or separate incidents.
> >
> > (B) The offense was carried out in a dispassionate and calculated manner, such as an execution-style murder.
> >
> > (C) The victim was abused, defiled or mutilated during or after the offense.
> >
> > (D) The offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering.
> >
> > (E) The motive for the crime is inexplicable or very trivial in relation to the offense.
>
> (2) Previous Record of Violence. The prisoner on previous occasions inflicted or attempted to inflict serious injury on a victim, particularly if the prisoner demonstrated serious assaultive behavior at an early age.
>
> (3) Unstable Social History. The prisoner has a history of unstable or tumultuous relationships with others.
>
> (4) Sadistic Sexual Offenses. The prisoner has previously sexually assaulted another in a manner calculated to inflict unusual pain or fear upon the victim.

> (5) Psychological Factors. The prisoner has a lengthy history of severe mental problems related to the offense.
>
> (6) Institutional Behavior. The prisoner has engaged in serious misconduct in prison or jail.

15 Cal Code of Regulations § 2402(c) (2007).

> Factors favoring a finding of "suitability" include:
>
> (1) No Juvenile Record. The prisoner does not have a record of assaulting others as a juvenile or committing crimes with a potential of personal harm to victims.
>
> (2) Stable Social History. The prisoner has experienced reasonably stable relationships with others.
>
> (3) Signs of Remorse. The prisoner performed acts which tend to indicate the presence of remorse, such as attempting to repair the damage, seeking help for or relieving suffering of the victim, or indicating that he understands the nature and magnitude of the offense.
>
> (4) Motivation for Crime. The prisoner committed his crime as the result of significant stress in his life, especially if the stress has built over a long period of time.
>
> (5) Battered Women Syndrome. At the time of the commission of the crime, the prisoner suffered from Battered Women Syndrome, as defined in section 2000(b), and it appears the criminal behavior was the result of that victimization.
>
> (6) Lack of Criminal History. The prisoner lacks any significant history of violent crime.
>
> (7) Age. The prisoner's present age reduces the probability of recidivism.
>
> (8) Understanding and Plans for Future. The prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release.
>
> (9) Institutional Behavior. Institutional activities indicate an enhanced ability to function within the law upon release.

15 Cal Code of Regulations § 2402(d) (2007).

III

Petitioner's primary claim is that the Board lacked sufficient evidence upon which it could lawfully have relied in denying him parole. See Doc #16 at 21-22; Doc #17 at 16-46. Petitioner, however, has failed to meet his burden under the above-cited authorities.

Petitioner argues that the Board's continued reliance on his commitment offense violates his due process rights. Doc #17 at 26-41. In Irons v Carey, the court recognized that "indefinite detention based solely on an inmate's commitment offense, regardless of the extent of his rehabilitation, will at some point violate due process * * *." 2007 WL 2027359 at *6. Sass, 461 F3d at 1129. Petitioner's, however, is not such a case.

California law provides specifically for the commitment offense to be one factor considered by the Board. See Cal Penal Code § 3041(b) (West 2005); 15 Cal Code of Regulations § 2402(c)(1) (2007). The California Supreme Court recently reaffirmed the permissibility of relying on the commitment offense. In re Dannenberg, 34 Cal 4th 1061, 1095 (2005). The Ninth Circuit held in Irons that "[the] commitment offense, standing alone, is a sufficient basis for deeming a petitioner unsuitable where, as here, there is some evidence to support a finding that [the crime fell within the ambit of the standards set forth in 15 California Code of Regulations § 2402(c)]". 2007 WL 2027359 at *5.

The Board found that the crime involved multiple victims, a factor properly considered under 15 California Code of Regulations § 2402(c)(1)(A). Appx A-I, Ex C at 324. "Some

\\

evidence" supports this finding: victim Trujillo identified petitioner as the shooter and four witnesses who were at the scene identified petitioner as a participant in the crime. Appx A-I, Ex A at 149. Furthermore, petitioner admitted that it was he who asked the victims for money and fired the initial shot. Appx A-I, Ex A at 175; Appx A-II at 406, 644.

There is also some evidence that petitioner carried out the crime in a dispassionate and calculated manner, namely, eyewitness testimony that petitioner stood over Garcia and shot him while he lay injured on the ground. Id. Petitioner argues, erroneously, that as a matter of law the Board cannot find that a homicide in the second degree was carried out in a dispassionate and calculated manner. Doc #16 at 17-18; Doc #17 at 30-31. This factor is to be considered pursuant to 15 California Code of Regulations § 2402(c)(1)(B). Because this is a considered factor, the parole board's finding must be upheld if it is supported by some evidence. Furthermore, in Dannenberg, 34 Cal 4th at 1095, the California Supreme Court recognized that the Board could properly consider factors beyond the minimum elements of second degree murder. See also Irons, 2007 WL 2027359 at *4. The court in Dannenberg upheld the Board's denial of parole that "pointed to circumstances of the inmate's offense suggesting viciousness beyond the minimum elements of second degree murder * * *." Dannenberg, 34 Cal 4th at 1095. Unquestionably, "some evidence" supports the Board's finding that petitioner carried out the crime in a dispassionate and calculated manner.

Petitioner's primary contention —— that it is impermissible to rely solely on the commitment offense to deny

parole —— fails because the Board's denial did not rely solely on the commitment offense. Furthermore, the cases that petitioner cites in support of his argument involve prisoners who have exhibited exemplary institutional behavior and are not analogous to petitioner's case. Doc #17 at 34-40. For example, in Rosenkrantz v Marshall, 444 F Supp 2d 1063, 1073 (ND Cal 2006), cited by petitioner at Doc #17 at 35, petitioner Rosenkrantz had no disciplinary record while in prison and was a stellar inmate in all respects. The same is true of the habeas petitioner in In re Scott, 133 Cal App 4th 573, 582 (2005), also cited by petitioner. Doc #17 at 37. Petitioner also relies upon Irons v Warden, 358 F Supp 2d 936 (ED Cal 2005)(Doc #17 at 39), but this case was since reversed by Irons v Carey, 2007 WL 2027359; moreover, Irons had exhibited model behavior in prison, yet the court upheld the Board's denial of parole based solely on his commitment offense. 2007 WL 2027359 *2, *5. Petitioner's reliance on these authorities is therefore unavailing. The superior court's opinion upholding the Board's findings regarding petitioner's commitment offense therefore was not contrary to, or an unreasonable application of, federal law or based on an unreasonable determination of the facts.

In denying parole, the Board also relied, in part, on petitioner's disciplinary record while incarcerated. Appx A-I, Ex C at 31-32. Petitioner asserts that he had a "transition" period upon entering prison and that "he has had no disciplinaries resulting from any physical altercation within the past eighteen (18) years." Doc #16 at 14; Doc #17 at 26. But the Board's reliance on the fact that petitioner received a total of thirteen CDC 115s and twelve CDC 128s while incarcerated, while receiving

only one "laudatory chrono" dated January 29, 1988 constitutes "some evidence" supporting the denial. Appx A-I, Ex C at 323; Appx A-I, Ex A at 23. Petitioner most recently received a CDC 128 in January 2000 for being absent from assignment, as well as a CDC 115 in November 1999 for disobeying a direct order. Appx A-I, Ex C at 322. His CDC 115s also include a stabbing assault on another inmate, conspiracy to assault prison staff and disobeying direct orders. Appx A-I, Ex A at 20-22. The Board is required to consider serious institutional misconduct when deciding whether a prisoner is suitable for parole and properly did so here. See 15 Cal Code of Regulations § 2402(c)(6).

In addition, the record supports the Board's finding, discussed above, that CDC staff psychologist Dr Terrini's psychological evaluation of petitioner's propensity for violence if released was inconclusive because it was based on an erroneous premise. Appx A-I, Ex C at 322. The Board's rejection of Dr Terrini's projection of petitioner's violence potential if released is therefore supported by some evidence in the record.

The superior court's ruling upholding the Board's findings regarding petitioner's disciplinary record and the Terrini report therefore was not contrary to, or an unreasonable application of, federal law or based on an unreasonable determination of the facts.

The Board's finding that petitioner has not sufficiently participated in self-help and therapy programming, see id, Ex C at 321, is supported by "some evidence." Petitioner admits that he has not participated in Narcotics Anonymous or Alcoholics Anonymous since 1999, see id at 301, despite the comment in Terrini's 1999

evaluation that "[t]he most significant risk factor for this man would be continued abuse of alcohol." See id, Ex B at 223. Terrini further recommended that if parole were granted, petitioner should abstain from all alcohol and drug use, submit to monitoring and be required to attend self-help groups such as Alcoholics Anonymous. Id. Accordingly, petitioner's documented failure to participate sufficiently in self-help programming constitutes some evidence that the Board lawfully relied on in denying parole. The superior court's opinion upholding the Board's findings regarding petitioner's failure to participate in sufficient self-help programming therefore was not contrary to, or an unreasonable application of, federal law or based on an unreasonable determination of the facts.

Given this body of evidence supporting the Board's denial of parole, it is unnecessary to delve into the other factors listed by the Board, such as petitioner's lack of realistic parole and employment plans. See Biggs, 334 F3d at 916 (holding that "the district court was correct in finding that in spite of the fact that several of the Board's findings were unsupported, there was some evidence supporting the Board's decision that Biggs is not entitled to relief at this time"); Sass, 461 F3d at 1128 ("the relevant question [in determining whether the some evidence standard is met] is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board"). The Board, while recognizing some of petitioner's laudable strides toward self-improvement, ultimately concluded that the "positive aspects of [petitioner's] behavior don't outweigh the factors of unsuitability at this time." Id, Ex C at 323-24. The

superior court upheld that decision and this court has no basis for disturbing the state court's determination that the Board's decision meets the "some evidence" standard.

IV

Petitioner also makes several legal arguments in support of his petition. The court will address each in turn.

A

Petitioner asserts that he is entitled to parole pursuant to his plea agreement. See Doc #16 at 19-20; Doc #17 at 47-53. Specifically, petitioner argues that the Board has turned his negotiated plea of second degree murder into a first degree murder charge by continuing to deny him parole. Id. This argument is without merit.

Under California law, plea agreements are subject to the ordinary rules of contract interpretation. See Buckley v Terhune, 441 F3d 688, 694-95 (9th Cir 2006); Brown v Poole, 337 F3d 1155, 1159 (9th Cir 2003). California courts are to look first to the plain meaning of the agreement. See Cal Civil Code §§ 1638, 1644. Petitioner pled guilty to second degree murder and the plea agreement he struck with the government set forth a term of punishment of fifteen years to life, with a two-year enhancement for the use of a firearm during the commission of a crime. See Appx A-I, Ex A at 97. Petitioner has not identified any provision in the plea agreement or any promises made by the government entitling him to be released at a determinate time.

\\

Petitioner voluntarily entered into a plea agreement with the government with the understanding that he might spend the rest of his life in prison. The superior court's determination that the Board's decision to deny petitioner's parole was consistent with its primary mandate to protect the safety of the community was consistent with Irons and Sass and will therefore not be disturbed by this court.

B

Petitioner alleges that former Governor Gray Davis had an informal "no parole" policy for "virtually all prisoners convicted of murder" and that the Board, in contravention of California Penal Code § 3041's mandate that the board "shall normally set" parole, followed this policy in his case. See Doc #17 at 53-68; Doc #16 at 24-26. Petitioner further argues that this alleged policy is arbitrary and capricious and, as a result, violates his due process rights, equal protection rights and his right to be free from cruel and unusual punishment. Id. While petitioner argues this point at length and submits a voluminous record in support of his argument, the court is unpersuaded.

The California Supreme Court considered a similar contention in In re Rosenkrantz, 29 Cal 4th 616, 685-86 (2002) and held that Governor Davis's reversal of most of the Board's decisions to grant parole did not constitute evidence of a blanket no-parole policy warranting reversal in a specific case where denial was supported by a written decision detailing the factors and evidence supporting the decision.

\\

Although the Rosenkrantz decision did not directly address petitioner's contention that the Board itself is carrying out a policy of denying parole across the board, it implicitly finds the point without merit because it recognizes that the Board recommends parole in more cases than the governor approves:

> Petitioner has not presented any evidence establishing that the Governor's actual decisions reversing grants of parole by the Board failed to engage in an individualized consideration of the factors concerning parole suitability, or that the decisions themselves reflected or relied upon any blanket policy of denying parole to all murderers. The circumstance that the Governor has reversed most of the Board's decisions granting parole does not establish that he follows a blanket policy of denying parole or that his decision in the present case was based upon such a policy, rather than upon a consideration of the factors and evidence discussed in the Governor's lengthy written decision denying petitioner parole. Such reversals simply may indicate that the Governor is more stringent or cautious than the Board in evaluating the circumstances of a particular offense and the relative risk to public safety that may be posed by the release of a particular individual.

29 Cal 4th at 682.

Also of relevance here, the United States Supreme Court held in California Department of Corrections v Morales, 514 US 499 (1995), that an amendment to California's parole statute did not violate the Ex Post Facto Clause when applied to individuals sentenced before the amendment because of California's use of "particularized findings" combined with the Board's broad discretion under the statute.

Petitioner effectively asks the court to overrule In re Rosenkrantz, asserting that "an unlawful policy does in fact exist" under which "it routinely violates due process by summarily denying parole without meaningful review of the facts." Doc # 17 at 61,

63. The court declines to delve into the matters of state-wide policy that petitioner seeks to introduce in support of his petition because the record demonstrates that the Board conducted a particularized review of the facts in petitioner's case and rendered a decision that was supported by "some evidence" as the Constitution requires.

In the instant case, the Board made an individualized decision, supported by not merely "some," but ample evidence in the record, that petitioner would constitute an unreasonable risk of danger to society if paroled. Accordingly, the superior court did not unreasonably apply federal law or make an unreasonable determination of the facts in ruling against petitioner on this issue.

C

Petitioner also argues that the Board was required to consider the proportionality of the term he has served in comparison to other prisoners convicted of second-degree murder. The court notes that this issue was adjudicated by the California Supreme Court in In re Dannenberg, which explicitly reversed In Re Ramirez, 94 Cal App 4th 549 (2001), upon which petitioner relies throughout much of his brief. In Dannenberg, the court explained:

> When the time comes to evaluate the individual life inmate's suitability for release on parole, the BPT is authorized —— indeed, required —— to eschew term uniformity, based simply on similar punishment for similar crimes, in the interest of public safety in the particular case. Under this "hybrid" sentencing scheme * * *, an inmate whose offense was so serious as to warrant, at the outset, a maximum term of life in prison, may be denied parole during whatever time the Board deems required for "this individual" by "consideration of the public safety." * * *

> So long as the Board's finding of unsuitability flows from pertinent criteria, and is supported by "some evidence" in the record before the Board * * *, the overriding statutory concern for public safety in the individual case trumps any expectancy the indeterminate life inmate may have in a term of comparative equality with those served by other similar offenders.

34 Cal 4th 1061, 1076. The Ninth Circuit agreed with Dannenberg in Sass, 461 F3d at 1127-28. Therefore, it cannot be said that the superior court unreasonably applied federal law in relying on Dannenberg to rule against petitioner on this issue.

V

For the reasons stated herein, the petition for a writ of habeas corpus is DENIED. The clerk is directed to close file number C 05-3564 and terminate any pending motions.

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Chief Judge